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SUPPLEMENTAL BRIEF FOR RESPONDENT

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One Thousand Six Hundred Sixty-Four



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

THE ERIE & WESTERN TRANSPORTATION COMPANY et al.,
vs.
Petitioners, }
THE PROPELLER "NEW YORK", THE UNION STEAMBOAT COMPANY,
Respondent, }
No. 277.

STATEMENT.

The time under the rules of the court in which to prepare a brief in answer to the brief of petitioner is so short that we prepared a brief in advance, and in answer to the brief accompanying the petition for a writ of *certiorari*.

We supposed the case would be presented only upon the points made in the petition, but find that the whole case is made the subject of argument in petitioners' brief. We, therefore, present as aid to the court, a brief and argument, such as would be proper on a full argument of the case upon the facts, in the first instance.

Petitioners' proctors in their brief present no reason why the "Conemaugh" should escape liability, but make their greatest efforts to make liable the "New York," so that she may share the damages in this case.

It must be remembered that no witnesses were called on behalf of the "New York." The case rests entirely upon the testimony of the "Conemaugh."

It was upon libelants' showing of how the collision occurred that the courts have found and decided.

This fact seems to be a thorn in the side of petitioners' proctors. They seem to think that the "New York" withheld much valuable exculpatory testimony in the case, and that for this she should be condemned, and if possible found in fault.

To further increase the record in this case would add nothing to the evidence except to further emphasize the many faults of the "Conemaugh," which are now sufficient to condemn, and establish her faults and liability.

In considering the relative duties of the "New York" and the "Conemaugh," it is necessary to consider the place, time, and the circumstances under which these vessels were approaching with a view to passing each other.

The "New York" had signaled the "Burling-

ton," and saw coming toward her a number of red lights, which clearly indicated that they were upon vessels in tow of the one that she had exchanged signals with; the "New York" had before her the lights which at night, form an apparently unbroken line of lights across the river from shore to shore, to one approaching the City of Detroit. (Rec., 28, 29.)

First. The number of these barges it was unable to determine in the darkness.

Second. She could not determine how near they were, or how near they would come to the land while swinging around before they would draw out of the "New York's" way.

Third. The distance of the channel bank from the visible shore could not be determined in the distance and darkness.

Fourth. The "Conemaugh" could not determine accurately from astern of the barges their course, the manner of their swing, their proximity to the shore, or the location of the channel bank abreast of them.

These were the circumstances, and these were the obstacles which made a meeting of these steamers more or less perilous until they had been removed. The "Conemaugh" instead of waiting made the first mistake by running into that part of the channel used by up-bound boats.

The "New York" made no such mistake.

The evidence as to the width of the channel which was open to use is as follows:

Captain Miller, of the "Conemaugh," says three lengths or 750 feet (p. 18).

Captain Powrie, of the "Burlington," who selected the route, 1-4 of the width of the river, or 700 feet (p. 61).

Jordan, his mate, the same distance (p. 81).

Hogan, mate of the "Conemaugh," three lengths or 625 to 750 feet (141).

This is the testimony of the officers of the two steam vessels, men of proven intelligence and nautical skill. Then there is Jeans, master of the "Amaranth," 700 to 750 feet (87).

Now, against this we have Robert and Loomis Smith, masters of the barges "Wesley" and "Ferguson," May, seaman on the "Conemaugh," Errill and Davidson, seamen on the "Ferguson," and "Wesley" respectively.

Can there be any doubt upon this testimony where the preponderance lies?

Does not the weight of the evidence establish that distance at 1-4 of the channel width or from 600 to 750 feet?

The channel bank is admitted by actual measurement to be 235 feet (p. 81) from the water's edge, allowing nothing for the difference between the water's edge and the higher shore further back, which could be seen from the vessels that night.

This leaves the channel between the "Ferguson" and the channel bank or the navigable channel, as about 500 feet in width.

Now let us examine the testimony to see how far from the shore or the channel bank the collision occurred. It is true that some of the "Conemaugh's" witnesses say that the "Conemaugh" was almost on the bank when she was struck. This class of testimony is of little value in establishing an actual distance. It is open to some doubt because she was moving toward the bank at five miles an hour at least, and the bank was not visible, and it was dark. The witness, of all those who testified, best qualified to speak intelligently on this subject, is Captain Miller, and he says, (p. 19):

"Q. Can you tell the court how far you were from the channel bank when you struck? A. We were about one length, probably a little more."

Q. From the Canadian channel bank? A. Yes, sir.

Q. What did you do at the time of being struck, did you give any order to your engineer? A. Yes, sir; after he struck I gave him the long whistle to work her strong.

Q. How quickly did your bow touch bottom? A. I didn't feel that."

As the tendency is to get it too near rather than too far, this distance is probably between 300 and 400 feet.

Priest, lookout, on page 54, says he didn't notice when she went aground.

The collision then occurred at some point between a little more than a length of the "Conemaugh," say 300 feet at least from the channel bank, and the course of the barges 200 feet further west, and from this must be deducted the distance the "New York" passed the barges, or within the 200 feet left between where the "Conemaugh" was struck and the line of the barges.

The collision, therefore, could not have occurred in the place stated in the brief of petitioner, or as given on its charts.

The only tangible fault charged against the "New York" is that she ported and swung farther under this order than was necessary to clear the barges.

They admit (Brief, 101) that the master of the "Conemaugh" does not so testify. In fact, being interrogated on this point, he testifies (Rec., 188):

Q. "*What change of course did the "New York" make that was not necessary for her to make to come by those barges?*" A. *I do not know, sir; I was on my own boat at that time.*

Q. *You do not know that she made any change of course that was not necessary for her to make for that purpose, do you?* A. *I do not.*"

Petitioners attempt to establish a rank change of course by the "New York" to starboard and toward

the Canadian Bank, and that before she passed clear of the barges. In order to make this as rank as possible, they locate the barges well out in the stream and the collision close to the Canadian bank. These positions are not borne out by the testimony. The alleged maneuver of the "New York" is an entirely improbable one, and seems more so, if you assume that the "New York" was navigating unconscious of the presence of the "Conemaugh." It is then incomprehensible.

It is further improbable that a steamer like the "New York" which was holding her course unusually close to this line of barges, should in the darkness run with a hard-a-port helm directly for shore and toward a channel bank, the exact location of which could not be determined accurately in the daytime, much less in the darkness, and that too when practically clear of the barges. Why should she make such a change?

It was contrary to her former apparently careful management.

It was not to avoid the "Conemaugh," because they say she was not then seen, and if she had been, it would bring her into collision with her.

It was not to avoid the barges, because these were being passed safely.

It was not to avoid any other vessel, because there was no other vessel present.

It was not to avoid any obstruction, for the only one there, was the channel bank, and toward and not

away from this *they say* she was running full speed under hard-a-port helm.

It is, therefore, altogether an improbable movement and one that is not established by the proof.

Whatever testimony is offered here that the "New York" ported and ran over almost onto the Canadian bank of the river is unreliable for the reasons:

First. That those on the "Conemaugh" could not know, and, therefore, did not agree as to what did occur.

Second. The people on the opposite side of the river looking for a distance of half a mile into the darkness, could not see what was going on.

Third. They were in a position where the red light on the "New York" was absolutely shut out to them, because she was too far down the river, and they were practically *behind* her red light, until she swung it into view again while passing under the stern of the last barge.

(See Rec., 189):

"Q. *Then you can't recollect of any change in her heading until she struck you, from the time you passed the stern of the stern barge in the tow?* A. *No, sir; I can n ...*"

Captain Miller, who best knew, because he was most interested, testifies that he does not know whether such a change was made.

Would he not have known if it had been made?

Would it not have been perfectly apparent to him?

The vessels were close together; he was watching the "New York"; he could see the whole of her; he knew the surrounding circumstances, and when under all

these he is not willing to say that she made a change, and such a change is altogether improbable, we must assume that no such change was made.

To establish that the "Conemaugh" could not have been over near the Canadian bank at the time she was struck, let us examine the evidence to see where she was just before or about the time she blew the alarm whistle, which preceded the collision but a few seconds.

This evidence will also demonstrate that she was not up above the tow, as shown by the charts of petitioner, but prior to the time of blowing the alarm whistle, she was and had been for some time, to the starboard of the last barge and within the bight of the tow, practically behind it and shielded by it.

In order to demonstrate that she was not up above as was shown by the charts of petitioner, but was always within the bight or above the line of the tow, we have collected the testimony upon this point.

Where, with reference to the line of barges, was the "Conemaugh" before and at the time she blew her third signal?

HUGH O. MILLER, master of "Conemaugh" (p. 39):

"Q. You stood on about the same length of time, I suppose, then you repeated your signal? A. Somewhere about the same.

Q. Making the third signal? A. Yes, sir.

Q. Hadn't you got clear of the barges by that time? A. No, sir.

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm? A. Yes, sir.

Q. He was then showing you both his side lights? A. Yes, sir.

Q. And you hadn't reached the course of the stern barge? A. Coming on to it then about that time."

GEORGE PRIEST, lookout on "Conemaugh" at time of collision (p. 46):

"Q. When you gave the danger signal on your boat, which was nearer to the Canadian shore, those dark objects, that is, the tail of the tow, or the 'Conemaugh'? A. The tail of the tow, as far as I could see."

JOHN A. HOGAN, second mate of the "Conemaugh" (p. 147):

"Q. The 'Conemaugh' had gotten under the stern of the rear barge at that time? A. No, sir.

Q. And it was before the 'Conemaugh' got to the stern of the rear barge that she blew the third blast of two whistles? A. Yes, sir."

FRED MAY, watchman of the "Conemaugh" (p. 56):

"Q. At the time of the alarm whistle, as it appeared to you, was he nearer the Canadian shore, the tail of the tow or the vessel you were on? A. I think the 'Conemaugh' was a little bit nearer the American shore.

Q. You mean to say the 'Conemaugh' had passed across the line of the barge before she blew the alarm? A. No, I didn't mean to say that.

Q. Then she didn't pass it before she blew the alarm? A. She might have been a little one way or the other, she was about abreast of it."

LOOMIS P. SMITH, master of "Ferguson" (p. 102):

"Q. When the 'Conemaugh' was blowing her whistles to the 'New York,' she was on your starboard hand astern, wasn't she? A. Yes, sir.

Q. And when she blew the alarm whistles, she had got under your stern? A. She was directly astern of me.

Q. And the collision occurred immediately after that? A. Shortly after that.

(104) Q. *You say that she blew the 'New York' three separate signals of two blasts each?* A. Yes, sir.

Q. *And during all that time she was astern of your barge or on the starboard side of you?* A. *On the starboard side of me.*

Q. *As I understand you, it wasn't until she blew the alarm whistles that she got from under your stern?* A. *She was passing across my stern.*

Q. *At the time she blew the alarm whistles? A* Yes, sir; *up the river and astern of me.*"

DOMINICK JEANS, captain of "Amaranth" (p. 87):

"Q. What did you see of the 'Conemaugh?'
A. When I first noticed her, I saw him coming down the river; I thought he was a little in the center of the river, or a little more on the American side; and I saw him after we began to turn around starboard his wheel; I thought he was going under our stern. I watched him closely, and I saw his green and red light and mast head light along, until he came to sheer on the Canada side, then I lost his red light and I saw his green light."

The District Court also found that when the "Conemaugh" blew her alarm whistles she had just crossed the wake of the stern barge "Ferguson."

The "Conemaugh" must have been close to the "Ferguson" because she only had 700 feet of space to pass over to reach her from the time she began to blow her signals, and she was running more than twice as fast as the barges, and in the beginning much more than that, so that by running 500 or 600 feet the "Conemaugh" would be within 300 feet of the barges at the time she crossed the stern of the "Ferguson," allowing for the speed of the barges.

That with the "Conemaugh" behind and to the starboard of the barges, virtually hedged in and protected by them, against the "New York," passing under her stern was an easy and safe maneuver, and

this must be perfectly apparent. There was no obstacle in her way to prevent her doing so.

Capt. Miller admits that if he had ported instead of starboarding, after blowing the third signal, he then would have passed on the port side of the "New York." He was at that time on the port side of the "New York," seeing only her red light.

He was not clear of the line of the barges. He was still west of them, or just behind the "Ferguson," and had only just steadied from, or was still swinging under, a port helm.

If he had continued he would have remained on the starboard side of the "Ferguson" out of all danger from the "New York," and by simply slowing up (a possible delay of a minute) he would have found himself clear of both the "New York" and the "Ferguson."

"Q. *If you hadn't steadied from the port helm, you think you would have swung down on the port side of the 'New York?'* A. *Yes, sir.*" (Rec., 40.)

Why didn't he do this?

His excuse is that having blown two blasts he proposed to clear or collide in accordance with that signal.

Is this an excuse for adopting a dangerous mode of passing, as against a safe one?

Is it a sufficient excuse for violating the directions of the Inspectors?

It must be remembered that during all of this time the "Conemaugh" was running towards and into that part of the channel or fair way to which the "New York" had the greater right.

The master of the "Conemaugh" is the only witness who says that he had, while blowing both the second and third signals, both lights of the "New York" in view.

The most he could claim for his position as against the "New York," therefore, was that she was directly end on to the "Conemaugh." He had to cross her bow at some time and place before he could pass her. When and where did he expect to do it?

Or did he expect the "New York" to change to starboard to help him out of this difficulty? A difficulty of which he was the author. Why didn't he get onto the starboard side of the "New York" at once when he first saw her two lights? Why didn't he get

the steamers into such positions that they were showing green light to green light? The positions which they must take before they could safely pass starboard to starboard.

According to the libellants he had a clear channel of at least 600 feet to the eastward of the "New York" to do it in.

Why did he wait?

If he could not do it, was it because the course and heading of the "New York" was such when the second signal was blown that it did not leave him room?

If so, then she could not have been showing him both side lights, but was showing him only her red light, and he must wait until she should starboard to bring both her lights in view, and this would not be until she was clear of and passing under the stern of the "Ferguson." If this was so, he was navigating his steamer so that the "New York" must avoid him and not he the "New York." Is not this the plainest violation of Rule 19 and Article 16?

The courses and positions of the "Conemaugh" and "New York" demonstrate that Capt. Miller could not at any time after his first signal have seen both lights of the "New York," and hence it is that not a single witness from the "Conemaugh's" decks agrees with him as to the appearance of the "New York's" lights.

Priest says (45) that he lost the red light before the second signal was blown, and when the third was blown lost the red and saw only the green light, and when the alarm was blown saw only the red, and (46) when the "New York" was coming towards the third barge he saw only the green light, and when she came on to them was showing both lights.

Hogan (139) says he saw both lights of the "New York" when the second whistle was blown, and when the third was blown saw only the red light and no green light on the "New York." (140.) When he saw both lights the "New York" was a mile away in the middle of the river, and when the third whistle was blown she was somewhere around the third barge ("Amaranth"), and when the alarm was blown "New York" was somewhere abreast of the last barge ("Ferguson"). (141.) Before she struck he saw "New York's" both lights.

Crowe, fireman of "Conemaugh," says (175): After first two whistles were blown "New York" in the middle of the river quite a ways below the tow showing both lights; after the second signal saw only the "New York's" red light (175); when the alarm was blown "New York" somewhere around the last barge showing her red light.

May and *Kelly*, the only other witnesses on the "Conemaugh," did not see the "New York's" lights until just before the collision.

First signal:

Miller first saw red light and signalled the first time. Crowe saw both lights. Priest saw both lights. Hogan didn't see her then.

Second signal:

Miller saw both lights three-quarters of a mile away. Hogan saw both lights a mile away at that time. Priest saw only the green. Crowe saw only the red light.

At the third signal:

Miller saw both lights.

Hogan saw only the red light.

Priest saw only the green light.

Crowe did not hear third signal.

When the alarm was blown:

Miller saw only the red.

Hogan saw only the red.

Priest saw only the red.

Crowe saw only the red.

The witnesses do not all agree except upon the last showing of the red light of the "New York."

What a confusion!

The physical facts, therefore, ought to control as against such evidence, and they show that after the first signal the two lights could not have been seen from where the "Conemaugh" was.

Hogan saw them after the second signal, but they were a mile away and he has confused the first with the second signal, as she must have been nearer when that signal was blown and was about a mile away when the first was blown.

At best the situation was complicated and far from clear, and during all of this time the "New York," refused to accept the offer of starboard to starboard or two whistle signal from the "Conemaugh," so that there was a condition of affairs which required the utmost caution, and the strictest observance of the rules of navigation, on the part of the steamer "Conemaugh."

To meet this situation Capt. Miller cut the Gordian knot of the difficulty by cutting across the line of the protecting tow and hurling his steamer across the

course of the "New York," and ringing up his engine and starboarding his helm, he brought about the collision and subsequent loss.

The Mary Powell 92 U.R. 408

The "E. A. Packer," 58 Fed. Rep., 251:

This was a collision in New York harbor between a barge in tow of the tug "Packer" and the barge "Atlanta," in tow of the tug "Wolverton," resulting in the sinking of the "Atlanta." The "Packer" had the "Wolverton" on her starboard side. The "Packer" starboarded across the course of the "Wolverton" and her tow.

The court held the "Packer" at fault for violating Rule 19 and Rule 2 of the Inspectors.

The Circuit Court of Appeals, on page 255, says:

"If an effort by starboarding to cross the bows of an approaching vessel would have been 'attended with great danger' if attempted at night or in thick weather, it would seem to be equally dangerous when attempted in the light of a controlling rule of navigation which clearly advised such approaching vessel that such effort was precisely the one thing which would not be attempted, and directed that vessel not only to keep her course, but even to assist a diametrically opposite maneuver by herself porting. That the supervising inspectors have made rules applying to navigation in the waters where these vessels were is now proved. That one of those rules covers the situation in which they found themselves at sighting is plain. Their authority to make such rules was not disputed on the argument; nor on the point involved here is there any apparent inconsistency between them and the rules of Section 4233. The rules prescribed

by authority, so far as they apply, constitute the law by which courts must test the navigation of vessels when brought in question before them."

The "Packer" in this case was guilty of the fault with which we charge the "Conemaugh."

Her conduct was more excusable than that of the "Conemaugh," because it appeared that a local custom among navigators of the waters that she was in, in part, at least, justified the maneuver of starboarding.

In the case at bar there was no excuse whatever. There was no local custom and no such conditions as justified a departure from the directions of Rule 2.

This collision is another illustration of how much safer it is to follow the rules than to adopt a course in violation of them.

It is rather difficult to understand how petitioners can "suck comfort" out of the authorities laying down the rule of law that a vessel which is *primarily* in fault for a collision can not shift the consequence in part upon the other vessel.

Which of these steamers was primarily in fault? The "Conemaugh" first proposed the course which would throw her across the "New York's" course, and which was in violation of the Inspector's Rule, and the "End on" rule. The "New York" in no way interfered with this. The "Conemaugh's" duty was active, that of "New York" passive.

In adopting the course of crossing the "New York's" course she was violating the rules. She proposed it a second and third time, and again and again violated the rules. At each successive proposition the risk of collision increased and yet at the time of these several proposals there was nothing for the "New York" to do different from what she was doing, and had been doing, and Capt. Miller found no fault with her maneuvers. They did not confuse him, or change any of his ideas of passing her.

Her duty was to hold her course and speed. Such is the law.

The acts of 1890 and 1895 by enactment have followed the decisions of the court on this point in the case of the "Britannia."

In the case of the "Delaware," 161 U. S., 459, at

467, Mr. Justice Brown says, referring to the Inspectors' Rules:

"These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on."

Under the rules of 1895, now governing vessels on the lakes, there are provisions for the use of the whistle for passing steamers, but there is this exception: "But the giving or answering a signal by a vessel required to keep her course shall not vary the duties or obligations of the respective vessels."

Suppose the "New York" had answered with two blasts each signal of the "Conemaugh" by blowing two blasts, this would not change her duty of keeping her course, or release the "Conemaugh" from her duty to keep out of the way.

The "Conemaugh's" persistency in violating the rule did not release her from her legal obligation.

So that hers was the primary fault or series of faults, and her adherence to them by starboarding across the "New York's" course was the approximate and direct cause of the collision. Had the "Conemaugh," even after she had three times proposed a violation of the rule, followed it by porting instead of starboarding, this collision would not have occurred. To exonerate her from liability she invokes the old and time-worn defense of a change of course, a defense which Judge Grier of the Supreme Court

once characterized "as always improbable and generally untrue."

The rule should be applied to the "Conemaugh."

Upon her is the burden of proof in this case.

The libellants must show by "clear proof the contributory negligence or fault" of the "New York."

The Clarion, 27 Fed. Rep., 128.

It was the duty of the "Conemaugh" under either rule 18 or 19 of the Revised Statutes, or the International Law, or the Canadian Statute, to pass the "New York" by porting her helm, and passing port side to port side.

Under the customs of the river supported by Article 25, of the Regulations of 1885, it was her duty to keep on that side of mid channel which lay on her starboard side.

The master of the "New York" had a right to rely upon the "Conemaugh's" obeying the law.

While it is now conceded that these steamers were

meeting on crossing courses such a relation was liable to cease at any time as these vessels approached each other and their courses became parallel.

When article 19 ceased to operate as the governing rule, article 18 would immediately take effect, and under this it became the duty of the "Conemaugh" to pass port to port. Approaching as she was the "New York" could not know when the change would be made, for the "Conemaugh" was in a position to make it at any time before she or the "New York" would pass the last of the barges.

Following the tow as she was she could not well be distinguished from one of the barges. The latter's spars and rigging, foreshortened in appearance to the "New York" as she approached, made the five or six mast with their rigging a nearly solid mass which could and doubtless did obscure the "Conemaugh" from view. Her masthead light could easily be taken for the bright light of a barge used for the latter to steer by, so that it would be difficult to distinguish the "Conemaugh" from a barge, and following the tow as she was, there was little danger from her as long as she followed the line of, or remained within the bight of the tow.

That she was behind the tow is so clearly established that it is unnecessary to again cite the testimony that supports this proposition.

Captain Miller says that while blowing the two last signals of two whistles he had in view the green and red lights of the "New York." The "Conemaugh," therefore, must have been during that time upon substantially an "end on" course toward the "New York;" otherwise both vessels moving, one or the other of the "New York's" lights would have been shut out.

The "Conemaugh" would therefore show the "New York" either both or only the red light. If both, the "New York" could not know which side of her the "Conemaugh" intended to pass her on, although in that position it would be her duty to port under the "end on" rule. If only her red light was in view then it would indicate that she intended to pass port and port.

So that in either case the port helm was the rule and the hope.

It would have been such an easy matter for the "Conemaugh" to have "hugged" the Canadian bank when she first starboarded. She would then have been so close to shore, and show her green light

alone so plainly to the "New York" that there would have been no doubt as to her course and heading. The "New York" so far away would not have interfered with such a maneuver.

Why didn't the "Conemaugh" do this?

Why did he follow up the tow?

Was he too afraid of the Canadian shore?

He says there was so much room there for passage. Why did he not take some of it? The "New York" only required from 50 to 100 feet in which to pass the barges. He could have all the remainder, and he says there was 700 or 800 feet of it, all good clear water.

Is it possible that he looked to the protection of the tow?

If not, why did he linger there? Lingered there, why did he not continue to do so?

If it was safer when she was far away, it was still safer when she came nearer.

Why did he starboard directly towards all the danger, where he was without promise, and where he ought also to have known, without hope?

Occasionally there is found some expression of a witness which tends to support by itself the position claimed by the Petitioner. This evidence is so thoroughly contradicted by other witnesses and by the physical possibilities and probabilities, that where all are *the one party's witnesses, and that party having the burden of proof*. We submit the fact, as claimed by that party, can not be found against the presumptively innocent one. The "Conemaugh"

chose the wrong course, blew the wrong signal a first, a second and a third time. All her signals were unanswered. She had no permission to violate the law, the rule and the usage. Stubbornly clinging to the series of errors she ended the difficulty by an alarm signal and a collision. For this she was held liable and justly so.

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W O Johnson, of coun